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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 2, Original.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

RESPONSE OF THE DEFENDANT TO THE MOTION OF THE COMPLAINANT SUBMITTED IN THE ABOVE-ENTITLED CAUSE.

STATE OF WEST VIRGINIA,
By WILLIAM G. CONLEY,
Attorney General.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 3, Original.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

RESPONSE OF THE DEFENDANT TO THE MOTION OF THE COMPLAINANT SUBMITTED IN THE ABOVE-ENTITLED CAUSE.

And now on this, the tenth day of October, 1911, comes the respondent, the State of West Virginia, by William G. Conley, Esquire, her Attorney General, and for response to the motion submitted in the above cause to

> "recommit the cause to the Special Master with instructions to ascertain and report forthwith to the court the amount of interest which the State of West Virginia should be required to pay on the principal sum

> already indicated by the court, or that the court will proceed otherwise as it may determine to adjudicate that question,"

says that she is advised that the court will not upon motion make such an order as that contemplated by this proceeding, which requires a determination of one of the principal points involved in the controversy in this cause, without the consent of this respondent, expressed by her counsel in court, because the grounds of said motion are based upon matters not appearing of record in the said cause; and further, there must be a hearing and consideration of the question whether or not any liability for interest exists on the part of this respondent before the court will again refer this cause to a Master.

This application should therefore be for leave to file a petition setting forth the facts fully upon which the complainant asks the relief sought by this motion. If no substantial objections were offered to the granting of such leave, then the filing of the petition would follow and the defendant could make answer thereto, and the rights of the parties as shown by the petition and answer thereto would be argued and heard by the court and such disposition be made thereof as would be proper and just.

If the proceeding were one by petition, it would become a pleading and its sufficiency could be tested by demurrer and its facts controverted by answer, evidence heard in support of and against

the petition applicable to the rights of the parties arising upon it, and the proceeding heard and determined as any other matter in the cause.

It seems, therefore, that this motion ought to be dismissed and that any proceeding had for this purpose can only be properly instituted by petition duly verified, thus affording the defendant opportunity to answer the petition and controvert the facts, or introduce by way of answer any other matter proper for the consideration of the court at this stage of the case.

And the respondent not waiving its motion going to the irregularity of the procedure on the part of the complainant seeking relief as stated in said motion, but adhering to and insisting upon the same, now submits to the court the further grounds why the relief sought by said motion should not be granted.

(1) The motion is premature, as the opinion of the court was handed down on the sixth day of March, 1911, after the adjournment of the regular session of the legislature, and when the special session of the legislature called for a specific purpose could not have constitutionally considered the matter.

(2) At the time the members of the legislature which convened in special session in May, 1911, were elected, the above cause had not been finally argued, and the impression obtained generally throughout the State that Virginia would not suc-

ceed with her bill asking for relief against the State as set forth therein, as Virginia was only suing on behalf of the holders of the certificates, who were to receive the proceeds of any decree that might be entered in the cause, and upon this ground it was generally understood and believed that Virginia would not obtain any decree in her favor against West Virginia. This opinion obtained so generally that the members of the legislature were not advised as to the wishes of their constituents relating to the matters in controversy in said suit, and hence it was not expected that they would ever be called upon in their legislative capacity to act thereon.

(3) It was assumed on the part of West Virginia that the State of Virginia would not act with undue haste in reference to a conference between the two States as suggested by this court in its opinion on final hearing until the Debt Commission of Virginia, by its representatives, called upon the Governor of West Virginia, after his proclamation had been made convening the legislature in special session to assemble in the month of May, 1911, and requested the said Governor to amend his proclamation by inserting therein a provision authorizing the legislature to enter upon a consideration of the Virginia debt matter. The Governor, under the authority vested in him by the Constitution of West Virginia, being of opinion that he could not amend his proclamation so as to

embody in the said call the consideration of the matter of the said debt, the same was not therefore included therein, as to have done so would have invalidated any acts performed by the legislature at such special session, and the failure of the Governor to include said matter in his proclamation was not for the purpose of evading the request or suggestion of this court in its opinion that the two States confer together touching the final settlement and adjustment of the controversy between them left undetermined by this court. The people of West Virginia are not unmindful of their obligation to meet the situation with reference to said debt as presented to them by the opinion of this court rendered in the above cause, but have it ever in mind and the subject will be considered at the next general election when the members of the next legislature will be chosen; and in one year and three months from this day the new legislature will convene in regular session, when that body can properly take up, consider, and dispose of the Virginia debt question.

(4) This respondent further avers that there is no one in West Virginia with any authority to negotiate or confer with Virginia, or any commission appointed by Virginia, in reference to the matters in controversy herein except the legislature; neither the Governor nor any other officer of the State of West Virginia nor the counsel in this cause having any power so to do.

(5) This is not an ordinary case like that obtaining between individual suitors, but is one arising between *quasi* sovereignties referred to this court in reliance upon the honor and constitutional obligations of the States concerned, rather than upon ordinary remedies, and in such controversies the rules which govern courts of equity call for more time and greater delay for the consideration of the questions arising between the parties than under ordinary circumstances, inasmuch as States are incapable of acting with that promptness with which individuals may act.

Rhode Island *vs.* Massachusetts, 13 Pet., 23;
10 Law Ed., 41.

(6) The respondent most respectfully calls the attention of this court to the fact that the Virginia Debt Commission was created by a joint resolution passed by the Virginia Assembly in 1894 and approved March 6 of that year, and the act of 1900, approved March 6 of that year, and suggests that this commission is not authorized to institute the proceeding which it is now seeking to prosecute, as such a matter was not within the purview of the joint resolution of 1894 or the act of 1900; that is, such a proceeding was not contemplated at the time this commission was created and empowered to act. The joint resolution was simply one providing that the commission be

> "authorized and directed to negotiate with the State of West Virginia an adjustment

> of the proportion of the public debt of the original State of Virginia, proper to be borne by West Virginia."

From this it will be perceived that the resolution did not contemplate the bringing of any suit, but only amicable negotiations to be conducted by this commission on the part of Virginia with West Virginia to ascertain what proportion of the public debt should be borne by West Virginia.

The act of 1900 authorized the commission,

> "by and with the advice and approval of the Attorney General of Virginia to take such action and institute such proceedings on behalf of the State as may in the judgment of said commission, and the Attorney General, be needful and proper to protect the interests of the State, and bring about and carry into effect a settlement as aforesaid. All the expenses involved in connection with any of the matters aforesaid shall be borne by the certificate holders, as provided in the joint resolution aforesaid, and the State shall not be subjected to any expense on that account."

The settlement referred to above was to be made with West Virginia with respect to the certificates issued for that part of the debt not assumed by Virginia, and only upon the basis that

> "said commission shall in no event enter into any negotiations hereunder except upon the basis that Virginia is bound only for the two-thirds of the debt of the original

> State, which she has already provided for as her equitable proportion thereof."

In pursuance of this authority the commission sent to the legislature of West Virginia that assembled in 1905 its representatives, and sought to obtain a settlement of the matter in controversy upon said basis. After this attempted negotiation on the part of the commission through its representatives, the Debt Commission reported the results thereof to the General Assembly of Virginia on January 9, 1906. Afterwards, with the approval of the Attorney General of Virginia, and the consent of the certificate holders, a suit was instituted in the name of Virginia to ascertain the proportion of the debt to be borne by West Virginia. After the various steps taken in the case and the cause submitted to the court for final determination of the matters in controversy, the court ascertained and fixed the proportion of the public debt to be borne by West Virginia at the sum specified in its decree, leaving the matter of interest undetermined, but upon a different basis than that upon which the commission was empowered to act.

This act of the court presented a new phase of the case and not one contemplated by either of the parties at any time before the institution of this suit or during its progress, and not contemplated by the commission or the legislature of Virginia when the commission was created and em-

powered to act. If this matter were brought to the attention of the legislature of Virginia in the present light of the situation, being now fully advised as to the effect of the opinion of the court with reference to the interests of Virginia, the General Assembly of that State would probably not insist upon further contending with West Virginia for interest, and would be satisfied with West Virginia's assumption of such amount as might be agreed upon between the two States acting in joint conference through a disinterested commission composed wholly of the citizens of the two States.

In view of these considerations it is respectfully submitted that the motion of the complainant ought not to prevail, and that no further action should be taken by this court until the legislature of West Virginia has had an opportunity in regular session to consider this case along the lines and in the spirit indicated by this court in its opinion announced on the 6th of March, 1911.

All of which is respectfully submitted.

STATE OF WEST VIRGINIA,
By WILLIAM G. CONLEY,
Attorney General.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 2, Original.

COMMONWEALTH OF VIRGINIA,
COMPLAINANT,

vs.

STATE OF WEST VIRGINIA, DEFENDANT.

IN EQUITY.

NOTE OF ARGUMENT IN RESISTANCE OF COMPLAINANT'S MOTION THAT THE COURT PROCEED TO ADJUDICATE ALL UNDECIDED QUESTIONS IN THE CAUSE.

It is respectfully submitted that there are but two questions for consideration in the determination and decision of this motion. They are:

I. Is the West Virginia Commission making a present effort in good faith to negotiate a settle-

ment of West Virginia's equitable portion of the Virginia debt in accordance with the suggestion of this court? And,

II. If there be a present and sincere effort to that end on the part of the West Virginia Commission, does the fact that it is under the necessity of reporting back to the governor and legislature of the State of West Virginia the result of its negotiations emasculate the Commission and render its negotiations a mere idle and empty form?

The first question must be answered yes and the second no, and we shall undertake to briefly give the reasons therefor.

I.

ACTIVITY AND GOOD FAITH OF WEST VIRGINIA COMMISSION.

The response filed to the motion herein, together with the exhibits therewith, shows that the West Virginia Commission has not ceased its activities from the time of its organization, on the tenth day of June, 1913, to the present time, and that it is still active along the line of negotiation, notwithstanding the pendency of the present motion. Indeed, upon the very day that this motion bears date and before notice thereof had been served upon the State of West Virginia, the chairman of the West Virginia Commission, in consequence of

a resolution adopted by a sub-committee thereof, mailed a letter to the chairman of the Virginia Commission, informing him, and requesting him to so inform the Virginia Commission, "that the West Virginia Commission has in course of preparation a proposition (looking to a settlement) to be presented to your Commission at the earliest moment." The full text of this letter is as follows:

"FAIRMONT, WEST VIRGINIA,
September 22, 1913.

"Honorable J. B. MOON,
"*Chairman Virginia Debt Commission, Charlottesville, Virginia.*

"MY DEAR SIR: I am instructed by a sub-committee of the West Virginia Commission, appointed by the Governor of that State to negotiate a settlement, in accordance with the suggestions of the Supreme Court of the United States, of the controversy between the States of Virginia and West Virginia relative to the settlement of the Virginia debt, to say to you, and through you to the Virginia Commission, that the West Virginia Commission has in course of preparation a proposition (looking to a settlement) to be presented to your Commission at the earliest moment; but that it will yet require some three or four months' time in which to put said proposition in final and intelligent form. I cordially endorse the recommendation of the sub-committee, and hope it will be agreeable to your Commission to consider the same favorably.

"In the meantime, if your Commission should desire to submit any suggestions or

propositions to this Commission, looking to the same end, we would gladly, and without unnecessary delay, consider the same.

"With great respect, I remain,

"Yours, etc.,

"JOHN W. MASON,

"Chairman West Virginia Commission."

It likewise appears from the response to the motion that—

> "While its Commission" (the West Virginia Commission) "and the sub-committee thereof, together with the Governor and Attorney General of the State, were diligently and conscientiously using every effort which they reasonably could use, and while they were exercising due diligence and were proceeding with all deliberate speed to carry into execution the requirements imposed upon them by the joint resolution of the Legislature of the State of West Virginia of February 21, 1913, and while they were formulating a proposition to be made to the Virginia Commission, as requested by said Commission at the Washington conference hereinbefore referred to, to the end that the matters in controversy between the two States might be settled in accordance with the suggestion of this honorable court, made in its opinion rendered March 6, 1911, as interpreted by its opinion rendered October 30, 1911, the Commonwealth of Virginia served notice of the present motion." Par. 12 of Response.

These are the words of the State, spoken through its chief law officer, its Attorney General, and the

sincerity and truth thereof, we presume, will be conceded.

Nor is this all: The West Virginia Commission has not only been active and earnest, but the exhibits filed with the response show progress in the negotiations. At the joint conference of the Commissions of the two States, held at Washington on the 25th and 26th days of July, 1913, the State of Virginia had no proposition to make, and made none. At first, it contented itself with presenting to the West Virginia Commission a resolution declaring that the negotiations must be confined to the single question of interest; but, upon the demurrer of the West Virginia Commission, finally invited a proposition from that Commission looking to a settlement of the entire matter. This, we presume, meant a lump sum; but the West Virginia Commission, feeling that it was not sufficiently informed at that time to take such a step, declined to make any proposition. Thereupon, the joint session adjourned. Subsequently, however, the West Virginia Commission, after the appointment of a sub-committee, and after some consideration by that committee of the question, began the preparation of a proposition to be submitted to the Virginia Commission. This is evidenced by the letter of its chairman of the 22d of September, 1913, hereinbefore set forth; and it is submitted that this shows progress. It may not be as rapid as the Virginia Commission would like, but it must be borne in mind that the latter Com-

mission occupies a very different position from the former. The Virginia Commission has nothing to do but to receive, while the West Virginia Commission may be required to provide and to pay.

II.

EFFECT OF REFERRING RESULT OF NEGOTIATIONS BACK TO THE LEGISLATURE OF WEST VIRGINIA.

The fact that the West Virginia Commission is required by the resolution of its appointment to report, without further action, the result of its negotiations to the governor of that State does not destroy the utility of the Commission; because it would have been necessary to make this report in any event, whatever might have been the form of the resolution. Even if the two Commissions should agree upon a fixed sum in settlement, the West Virginia Commission would have no power to pay the same under the West Virginia Constitution, whatever the terms of the resolution appointing it. It could not draw its warrant upon the treasury of the State, nor could that power be delegated to it; and, even if it should, a probable lack of funds would render its draft worthless. Neither could it, nor any of the officials of the State, in the absence of legislative sanction, issue bonds for the purpose of raising money for the discharge of the decree agreed; and for it, or them, to do so would simply result in putting worthless securities upon the market.

Section 3 of article 10 of the present Constitution of West Virginia (1872) reads as follows:

> "3. No money shall be drawn from the treasury but in pursuance of an appropriation made by law, and on a warrant issued thereon by the auditor; nor shall any money or fund be taken for any other purpose than that for which it has been or may be appropriated, or provided. A complete and detailed statement of the receipts and expenditures of the public moneys shall be published annually."

And section 4 of the same article reads:

> "4. No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion or defend the State in time of war; but the payment of any liability other than that for the ordinary expenses of the State shall be equally distributed over a period of at least twenty years."

See also section 5 of the same article:

> "The power of taxation of the legislature shall extend to provisions for the payment of the State debt and interest thereon, the support of free schools, and the payment of the annual estimated expenses of the State; but, whenever any deficiency in the revenue shall exist in any year, it shall, at the regular session thereof held next after the deficiency occurs, levy a tax for the ensuing year sufficient with the other sources of income to meet such deficiency, as well as the estimated expenses of such year."

But if it should be contended that the provisions of the present Constitution are not to govern, but that section 8 of article 8 of the Constitution of 1861, as being a part of the contract between the two States, should be looked to, then we find it reading as follows:

> "8. An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, in the year one thousand eight hundred and sixty-one, shall be assumed by this State; and the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years."

In any event, and under either Constitution, moneys can be drawn from the State treasury in only one way; and, wherever a debt is to be created (as by a bond issue) under section 4 of article 10 of the present Constitution, the payment thereof "shall be equally distributed over a period of at least twenty years," and under section 8 of article 8 of the Constitution of 1861 could be met only by providing "a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

It may be suggested, however, that these very difficulties only tend to show the inefficient character of the present West Virginia Commission, but not so. If the two Commissions should reach an

amicable and satisfactory adjustment of the controversy and the West Virginia Commission should report the result of such negotiations to the governor of that State and he should convene the legislature of his State, and transmit to it such report, with his recommendation added thereto, it would only be reasonable and proper to presume that the West Virginia legislature would confirm the report and take the necessary steps to carry it into execution.

It would be incorrect to say, as suggested by the representatives of the Commonwealth of Virginia, that this course would leave the whole matter at large and open up every question *de novo* for discussion upon the hustings and in the legislature, for it will be observed that the West Virginia resolution provides that—

> "The Commission shall make a report to the governor as soon as practicable, and, upon receipt of said report, the governor shall convene the legislature for the consideration of the same."

This means (unless unnecessary time should be consumed by the negotiation) that the members of the present legislature would be convened in extraordinary session by the governor, and that too before the election of the members of that body to convene in regular biennial session in the month of January, 1915. No election, therefore, would

intervene, and, being none, a discussion upon the "hustings" would not take place.

It is true that the West Virginia legislature, when convened to consider the report of the Commission, would have the power to disappoint us; but we can scarcely believe, and the court will not presume, that it would repudiate an equitable adjustment of this controversy.

OBSERVATIONS.

This court has proceeded with great caution in this case, that no injustice may be done to either of the high parties litigant. And when reference is made to the fact that this case has been pending for some years, it is not improper to say that there have been no unnecessary delays in the prosecution of this suit, but it has gone forward with that degree of speed consistent with the nature of the case and the requirements of justice. The court has been careful to avoid doing injustice to either of the parties, but desires that time for deliberation may be afforded and a conclusion reached without undue haste.

Should the Virginia Debt Commission reject the proposition for settlement, when made by the West Virginia Commission, then it will be time for the complainant to report this fact to this court, and move to expedite this cause. Until West Virginia has had a reasonable time, and has been afforded opportunity to respond to the suggestions of this court, in an intelligent, orderly manner, and has

had time and opportunity to comply with the requirements of the resolutions of the West Virginia Legislature, West Virginia will not be in default, and until such reasonable time elapses, a motion to speed this cause is premature, and to sustain this motion at this time, it is most respectfully submitted, would deprive this State of the right and privilege which this court has afforded her, of a peaceable adjustment of a quasi-international dispute.

It is therefore most respectfully submitted that this motion should, at this time, be overruled, or, it should be continued for a sufficient time to enable the West Virginia Commission to complete its labors, and to perform its duties, and it is suggested that not less than six months be given for that purpose.

Respectfully submitted,

A. A. LILLY,
Attorney General of West Virginia.

V. B. ARCHER,
CHARLES E. HOGG,
JOHN H. HOLT,
Of Counsel for West Virginia.

OCTOBER 13, 1913.